

TONY KNOWLES
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 22, 1998

BY HAND

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: CC Docket No. 96-61: Ex Parte Presentation

Dear Ms. Salas:

This letter is being filed in duplicate to report that, on Monday, December 21, 1998, the undersigned and Robert M. Halperin, counsel for the State of Alaska, met with Ari Fitzgerald of Chairman Kennard's office, to discuss the State of Alaska's views on the application of rate integration to CMRS providers. The State reiterated its positions as set forth in its letter of November 25, 1998 to Chairman Kennard, a copy of which is attached hereto.

Should there be any questions regarding this matter, please contact this office.

Sincerely,

A handwritten signature in cursive script that reads "Marideth J. Sandler".

Marideth J. Sandler
Associate Director of State/Federal Relations

Enclosure

cc: Ari Fitzgerald, Esq.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 25, 1998

Chairman William E. Kennard
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington D.C., 20554

Re: CC Docket No. 96-61 - Rate Integration

Dear Chairman Kennard:

A matter of great importance to the State of Alaska is currently pending before the Commission. Several commercial mobile radio service ("CMRS") providers have asked the Commission to forbear from applying, or otherwise reconsider the application of, the statutory requirement for rate integration to their interstate interexchange services. It is our understanding that the Commission must resolve the petitions for forbearance by approximately January 4, 1998.

This matter is of great importance to the State of Alaska for two reasons. First, the application of rate integration requirements to CMRS is important in its own right to assure that citizens of Alaska and other less populated, remote or insular areas are not discriminated against and can obtain the benefits of competition, as Congress and the Commission have required. Second, the State is very concerned that the Commission not take any action with respect to the application of rate integration requirements to the CMRS industry that calls into question its commitment to the application of rate integration to other providers of interexchange services.

The State's views on this matter were set forth in its October 31, 1997, opposition to the petitions for reconsideration. The State opposes the grant of petitions for reconsideration or forbearance, but does not oppose some clarification to provide CMRS providers additional guidance on how rate integration should be applied.

We write now in response to the letter to you from Bell Atlantic Mobile, Inc., dated November 10, 1998 ("BAM Letter"), which suggested that recent marketplace developments demonstrate that CMRS providers are already achieving the goal of

rate integration. We respectfully disagree. The State believes that the BAM Letter demonstrates that CMRS providers who seek forbearance misconstrue the nature of rate integration. They also do not establish that the statutory requirements for forbearance are satisfied.

**Requests for Forbearance Fundamentally
Misconstrue the Nature of Rate Integration**

Proponents of forbearance contend that rate integration is a form of rate regulation that is inconsistent with Section 332 of the Communications Act. BAM Letter at 1, 4. This argument fundamentally misconstrues the nature of rate integration.

First, rate integration is not rate regulation. The Commission does not regulate the rates for interstate interexchange services provided by such carriers as AT&T, MCI Worldcom, and Sprint, but there is no question that rate integration applies to those services. Far from constituting rate regulation, rate integration is a long-standing, fundamental Commission policy, now codified in statute, that requires that carriers providing an interstate, interexchange service not discriminate against those residing in remote or insular portions of the Nation.

Second, rate integration is not inconsistent with a market that is characterized by substantial competition. Indeed, Congress enacted Section 254(g), the statutory requirement for rate integration, after the Commission had concluded that AT&T, by far the largest interexchange carrier, was no longer to be regulated as a dominant carrier. The Commission's decision was necessarily based on the finding that competition in the interexchange business was sufficiently competitive that the carrier with the largest market share did not have market power. Nonetheless, Congress concluded that a statutory requirement for rate integration was necessary to make sure that all Americans benefited from competition.

The Commission has confirmed this point by rejecting a petition for forbearance from AT&T, which sought relief from the requirements of Section 254(g) in the provision of interexchange services in certain traffic corridors in and around New Jersey, notwithstanding the fact that the provision of interexchange services in those areas was more competitive than in other areas of the country.¹

¹ AT&T Request for Waiver of Section 64.1701 of the Commission's Rules, 12 FCC Rcd. 934 (1997).

Third, even if rate integration were not to apply to markets that have demonstrated some competitive characteristics, CMRS providers have not established that competition is sufficiently robust and uniform throughout the Nation to justify forbearance from rate integration for CMRS in a manner that is consistent with these Congressional and Commission decisions. For example, in contrast to the Commission's decision to treat AT&T as a non-dominant carrier, it is our understanding that the Commission has not found CMRS providers to be non-dominant.

Indeed, in its most recent annual report on the status of competition in wireless telecommunications, the Commission stated that the CMRS industry was not fully competitive and that competition was not uniform throughout the Nation. It said that although there has been "substantial progress towards a truly competitive mobile telephone marketplace," "this development is still in its early stages" and "there is ample room for improvement." Moreover, the Commission found that "many less populated areas are still awaiting the arrival of mobile telephone competition." Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with respect to Commercial Mobile Services, FCC 98-91, 12 (P&F) Comm. Reg. 623, 663 (1998). These findings, in the State's view, preclude a conclusion that there is no need for rate integration to be applied to CMRS.

Fourth, rate integration is a fundamental part of the universal service provisions of Section 254 of the Communications Act, as amended by the Telecommunications Act of 1996. Even if, contrary to the legislative history, rate integration were somehow to be viewed as rate regulation, Section 332 does not prevent the application of rate integration to CMRS providers. The Commission has already determined that if there is a conflict between Section 332 and Section 254, the latter section prevails because it was the later enacted provision.²

Fifth, rate integration is not, and never has been, confined to services that are provided solely by land-line facilities. The Commission's rate integration policy originated because of satellite technology.³ And the Commission reiterated the

² E.g., Federal-State Joint Board on Universal Service, Fourth Order on Reconsideration, 13 FCC Rcd. 5318, 5485 (1997). Of course, it does not appear that there is any conflict between those sections. Section 332(c)(3) preempts state and local regulation of CMRS rates, it says nothing about federal rate regulation.

³ Establishment of Domestic Communications-Satellite Facilities, Second Report and Order, 35 FCC 2d 844, 856-66 (1972), *aff'd on recon.*, Memorandum Opinion and Order, 38 FCC 2d 665, 695-96 (1972), *a'd sub nom. Network Project v. FCC*, 511 F.2d 786 (D.C. Cir. 1975).

application of rate integration to wireless technology when it rejected AMSC's request, in the proceeding in which the rate integration rule was promulgated, that its operations not be subject to geographic rate averaging and rate integration.⁴

**The Statutory Standards for
Forbearance Are Not Satisfied**

The Communications Act establishes a three-part test for determining whether request for forbearance should be granted. That test is not satisfied here.

The first element of the test is that enforcement of the requirement at issue "is not necessary to ensure that the charges, practices, classifications or regulations by, for or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory." 47 U.S.C. § 160(a)(1). As discussed above, rate integration is founded on the nondiscrimination provisions of the Communications Act. Rate integration is necessary precisely because, without it, discriminatory charges and practices with respect to telecommunications services to and from Alaska, Hawaii and certain other areas are indeed possible.⁵ Indeed, although

⁴ Policy and Rules Concerning the Interstate Interexchange Marketplace, Report and Order, 11 FCC Rcd. 9564, 9589 at ¶ 54. This regulatory history also refutes the argument, repeated in the BAM Letter (at 1), that the Commission applied rate integration requirements to CMRS providers without notice for the first time in an order denying motions for reconsideration.

⁵ Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, CC Docket No. 83-1376, Supplemental Order Inviting Comments, 4 FCC Rcd 395, 398 at ¶ 25 (1989) ("[c]ontinued integration of interstate MTS and WATS rates is necessary to ensure that all Alaska residents are able to participate fully in the social, economic, and political life of our nation. . . . [A] rate structure which averages interstate toll rates for states other than Alaska, while imposing deaveraged rates for service to and from Alaska could raise questions concerning an unjust and unreasonable discrimination pursuant to Section 202 of the [Communications] Act."); MTS and WATS Market Structure, CC Docket No. 78-72, Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 F.C.C. 2d 177, 192 at ¶ 63 (1980) ("[A] rate structure which averages rates in 48 states and de-averages rates in 2 states may subject the residents of those two states to an unreasonable prejudice or disadvantage within the meaning of Section 202(a). . . . We have (continued...)

Congress gave the Commission the authority under Section 332(a) to forbear from applying various statutory requirements to CMRS providers, Congress specifically precluded the Commission from forbearing from enforcing the nondiscrimination provisions of Section 202(a). In light of the purpose of rate integration and this legislative history, a nondiscrimination provision of the Act may not be forborne lightly, if at all.

In any event, the new information submitted by BAM does not establish that rate integration is not necessary to prevent discrimination. There is no evidence that integrated rates for interstate long distance services are universally available to CMRS customers. Indeed, although the BAM letter points to some examples of service plans in which the long distance rates are the same in all parts of the country served by a particular carrier, it does not seek to establish that these plans are available everywhere.

In fact, it does not appear that these plans are universally available to all CMRS customers. It appears that many of these plans require a customer to enroll in a new digital CMRS service, and these digital services are not uniformly available. The fine print in the advertisement for BAM's "DigitalChoice SingleRate" confirms this point in stating that "Digital Service not available in all areas. CDMA phone required."

Moreover, even if rate integrated service plans were available in all parts of the Nation, there is no evidence that the existence of the rate integration requirement is not an important cause of that development. Without this showing, the Commission cannot be confident that the benefits to be achieved by implementing rate integration would be achieved in the absence of regulation.

Because the first part of the test for forbearance is not satisfied, the petitions for forbearance may not be granted. In any event, however, the other parts of the test are not satisfied either. The second part of the test is that enforcement of the requirement at issue is not necessary for the protection of consumers. 47 U.S.C. § 160(a)(2). There is no evidence that rate integration requirements are not necessary to protect consumers in Alaska, Hawaii, and other remote, rural or insular areas. BAM's argument that the plans that it offers with one long-distance rate benefit consumers in Alaska and Hawaii misses the mark because BAM does not offer service in Alaska and Hawaii. The fact that the cost to a BAM customer in Washington, DC of a call he or she makes to Alaska or Hawaii

(...continued)

decided that a rate structure which uses different ratemaking methods to determine the rates which different users pay for comparable services is inconsistent with the national policy expressed in Section 202(a).").

is the same as a call to Chicago or Denver provides only limited benefits to Alaskans and Hawaiians because the recipients of the calls would generally not be paying the long distance charges.

CMRS providers have contended that competition alone is sufficient to protect consumers. Yet, the Commission has consistently rejected the argument that competition eliminates the need for regulations implementing Section 254(g),⁶ and for the reasons discussed above, competition does not appear to be more vigorous or more nationally uniform in connection with CMRS long distance than it is in connection with other long distance services.

Similarly, the third part of the forbearance test – that forbearance from the requirement is consistent with the public interest (47 U.S.C. § 160(a)(3)) – is not satisfied. There is no evidence that rates for CMRS long distance calls would be lower or less discriminatory without enforcement of the rate integration requirement.

CMRS providers contend that forbearance from rate integration is in the public interest because the requirement interferes with competition. There is no evidence, however, that rate integration is in fact interfering with competition. Rate integration does not require that CMRS providers not compete with respect to interstate long distance rates. It means only that they must offer the same interstate long distance rates wherever they provide service. Neither does rate integration eliminate the ability of CMRS providers to respond to competitive forces that may differ from one geographic area to the next. There are many other attributes of CMRS service on which providers can compete with different offers in different areas – such as monthly subscription charges, air time charges, service features, number of calls or call minutes included in the monthly charge, roaming costs, service areas.

Just as important, however, is that it is difficult to see how, based on the record before it, the Commission can forbear from applying rate integration requirements to CMRS providers without effectively gutting application of the requirement to other providers of interstate long distance services. Congress has clearly spoken that the public interest requires rate integration to prevent discrimination in the provision of interstate long distance services. As discussed above, the amount and geographic uniformity of competition in the CMRS industry does not appear to be greater than in other interstate long distance services. There does not appear, therefore, to be any factual basis for forbearance here.

⁶ AT&T Request for Waiver of Section 64.1701 of the Commission's Rules, supra; Policy and Rules Concerning the Interstate Interexchange Marketplace, Report and Order, supra. 11 FCC Rcd. at 9582-83, ¶ 38-39.

What the Commission Should Do

First, for all of the reasons set forth above, the State does not believe the Commission should grant the petitions for forbearance.

Second, the Commission could, if it believes it useful, give CMRS providers additional guidance on how rate integration applies to them. The State offers the following suggestions with respect to some of the issues that have been raised by CMRS providers.

Basic Requirement. The State believes that the a CMRS provider must offer the same rates for interstate long distance services in each state in which that provider operates. A service plan that provides rate integrated rates must be available to all subscribers. As the Commission has held in connection with geographic rate averaging, geographically specific plans with unintegrated interstate long distance rates may only be offered as a temporary promotion (with the unintegrated and otherwise geographically limited rates good for only 90 days).

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Affiliation. As the State stated in its October 31, 1997, opposition to the reconsideration petitions, the Commission may wish to clarify how rate integration applies to affiliated entities. The State believes that all service providers that are commonly controlled must be treated as a single entity for rate integration purposes. A problem arises, however, when a given provider is positively or negatively controlled by more than one otherwise unaffiliated entity. The State does not object to a clarification that provides that CMRS providers that are ultimately positively or negatively controlled by more than one unaffiliated parent company need not integrate its rates with those of either parent company.⁸

IntraMTA Calls. Given the difficulty in determining whether an interstate call is "interexchange," the State does not object to excluding all calls that originate and terminate in the same MTA from the rate integration requirement.

"One Rate" Plans. We understand that some CMRS providers have questioned whether a rate plan in which the per-minute charge is the same regardless of whether the call is "local" or "long distance" satisfies rate integration

⁷ Policy and Rules Concerning the Interstate Interexchange Marketplace, Report and Order, *supra*, 11 FCC Rcd. at 9576 ¶¶ 24, 29.

⁸ Thus, as we understand it, PrimeCo would not have to integrate its rates with either BAM or Airtouch. PrimeCo would, however, need to integrate its interstate long distance rates within its own operations.

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requirements. The State believes that such a plan does satisfy rate integration requirements if the rate charged under these "one rate" plans is the same in all areas served by the provider.

Thank you for your attention to this important matter. Two copies of this letter are being submitted for inclusion in the public file.

Respectfully submitted,



John W. Katz
Director of State/Federal Relations
and Special Counsel to the Governor

cc: Commissioner Harold Furchtgott-Roth
Commissioner Susan Ness
Commissioner Michael K. Powell
Commissioner Gloria Tristani
Lawrence E. Strickling
Daniel Phythyon
James D. Schlichting
Douglas L. Sloten
Jane E. Jackson
Jeanine Poltronieri
Peter Wolfe
S. Mark Tuller

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